

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SMARTMATIC USA CORP.,)	File No. 22-cv-98
SMARTMATIC INTERNATIONAL)	(WMW/JFD)
HOLDING B.V. and SGO)	
CORPORATION LIMITED,)	
)	St. Paul, Minnesota
Plaintiffs,)	February 23, 2023
)	2:59 p.m.
vs.)	VIDEO CONFERENCE
)	
MICHAEL J. LINDELL and MY)	
PILLOW, INC.,)	
)	
Defendants.)	

BEFORE THE HONORABLE JOHN F. DOCHERTY
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTION HEARING)

Proceedings reported by certified stenographer;
transcript produced with computer.

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P R O C E E D I N G S

IN OPEN COURT

(VIA ZOOM VIDEO CONFERENCE)

THE CLERK: Good afternoon, counsel. We're just waiting to get everybody's audio connected.

All right. Good afternoon, my name is Annika. I'm Judge Docherty's law clerk. I'm just going to get everyone checked in.

To make sure that you're audio and video is working, could you please say your name and who you represent and just begin with counsel for plaintiffs.

MR. BLOOM: Thank you. This is Michael Bloom, counsel for Smartmatic.

THE CLERK: Good morning -- good afternoon, Mr. Bloom.

MR. MANSKE: Good afternoon, Michael anybody else from your firm before I jump in?

MR. BLOOM: We're expecting Jamie Ward to be on, so let's see if she joins.

THE CLERK: I think I see her. One moment.

Good afternoon, Ms. Ward?

MS. WARD: Good afternoon.

MR. MANSKE: And I'm William Manske of the Robins Kaplan firm also on behalf of plaintiffs.

THE CLERK: And for defense counsel.

1 MR. ESLICK: Your Honor [sic], Matthew Eslick on
2 behalf of defendants. Can you hear and see me okay?

3 THE CLERK: I can. Thank you so much, Mr. Eslick.
4 And Mr. Parker?

5 MR. PARKER: Yes, hello. Andrew Parker on behalf
6 of the defendants as well. Mr. Eslick will be handling the
7 motion today.

8 THE CLERK: Thank you very much.

9 All right. And counsel all -- are we expecting
10 any other counsel today?

11 MR. BLOOM: Not for the plaintiffs.

12 MR. ESLICK: For the defendants' either.

13 THE CLERK: All right. Thank you very much.

14 The hearing will begin when Judge Docherty turns
15 on his audio and video. Thank you very much.

16 (Pause in proceedings)

17 THE COURT: Good afternoon, everybody.

18 I'm John Docherty. I'm the federal magistrate
19 judge assigned to this case. We're here today for two
20 motions to compel.

21 The plaintiffs have a motion to compel at Docket
22 Number 72.

23 The defendants have a motion to compel at Docket
24 Number 73.

25 Just a couple of housekeeping items, we are

1 recording this, however that is because the court reporter
2 in preparing a transcript may need to go back and check
3 something, so this is for her and is not available to
4 others.

5 Second of all, because of the weather here in
6 Minnesota the courthouse is actually closed, so I am coming
7 to you live from my house. Things have been fine today.
8 I'll just let you know that yesterday there was an unstable
9 internet connection. It was not a serious problem. It
10 caused a lag between me speaking and other people hearing
11 me.

12 If anything of the sort happens today, you have
13 not only my permission but my urging to speak up, even if
14 you have to interrupt somebody, because it's important that
15 everybody who is participating in this hearing be able to
16 hear and understand everything that is going on and not have
17 to sort of fill in the blanks.

18 And then I have organized this not so much by
19 docket number as I've got the RFPs in dispute, first,
20 whether that's because of the plaintiffs' motion or the
21 defendants' motion and then the interrogatories, whether
22 that's the plaintiffs' motion or that's the defendants'
23 motion.

24 That might mean some more going back and forth
25 between plaintiff and defendant than is customary, but I'm

1 confident that we'll get through everything. And certainly
2 if I miss anything, counsel can let me know.

3 So the first, therefore, item of business that
4 I've got is Smartmatic's motion to have the defendants --
5 well, hold on.

6 MR. BLOOM: Your Honor, this is Michael Bloom for
7 the plaintiffs. If I might just make one note very quickly.

8 I'm planning to argue the Smartmatic's offensive
9 motion to compel, affirmative motion to compel, and Ms. Ward
10 who also represents Smartmatic is planning to argue our
11 opposition to defendants' motion to compel.

12 THE COURT: Okay.

13 MR. BLOOM: So I hope that's okay.

14 THE COURT: Yeah, that's absolutely fine.

15 So I guess the first thing that would be coming up
16 is Smartmatic's contention that the defendants have not
17 complied with Rule 34 in the way that they have described
18 the documents they will produce and the documents they will
19 not produce.

20 And so, Mr. Bloom or Ms. Ward, I guess you would
21 have the floor at this point.

22 MR. BLOOM: Thank you, Your Honor.

23 I think on this Rule 34 issue, what we have is
24 basically a fundamental disagreement about how parties must
25 respond to a RFP for ESI.

1 We think that Rule 34 and the committee notes
2 thereto are pretty clear that in response to a request like
3 that the proper procedure is not to wait until you have
4 reviewed every document that hits on search terms to alert
5 the other side to what you think is objectionable and what
6 you're willing to produce, but at the outset when you --
7 when you assert your objections and your responses to the
8 RFPs, that you have an obligation to state the portion of
9 the request that you think is objectionable, if any, and to
10 the extent you do find a portion of the request
11 objectionable, you state what documents you are willing to
12 produce in response to that request.

13 Defendants here have taken the position -- well,
14 I'll just backtrack, for I think it's about 12 or 13 RFPs
15 that we submitted. Defendants submitted a series of
16 objections and then they stated, notwithstanding those
17 objections, defendants will produce responsive documents.

18 And in the meet and confer process we asked the
19 defendants, when you say you will produce responsive
20 documents, does that mean you're going to comply with the
21 request as written or you're going to produce a subset of
22 the documents or other?

23 And then the defendants informed us, we cannot
24 tell you that right now because we want to review all of the
25 documents in our possession first before we tell you which

1 portion of the request we think is discoverable.

2 Now, you know, to the extent that that's an
3 appropriate response, we'd submit that at this point, you
4 know, we're four months after we've submitted our RFPs and
5 discovery is scheduled to close end of June, and so our
6 position is that we need -- we need final responses on these
7 RFPs so we can determine whether we think that defendants
8 have proper objections to portions of our request, so we can
9 meet and confer about those objections and then we can
10 timely receive documents so that we can use them in
11 depositions.

12 And so I guess the bottom line is we don't think
13 that's a proper response as a threshold matter and certainly
14 not after four months have elapsed since we submitted our
15 responses -- or submitted our RFPs rather.

16 THE COURT: Yeah, Mr. Bloom, one of the things
17 that you said caught my attention, which was that you said
18 that this was a problem with the way that Rule 34 treats ESI
19 or words to that effect.

20 I didn't understand this to be an ESI issue, I
21 understood it to be a just general document issue.

22 MR. BLOOM: Sure. We think that in the 2015
23 committee notes they addressed ESI specifically as it
24 relates to Rule 34, and the committee says that when -- when
25 a party is responding to an RFP, whether that's an ESI or

1 RFP or otherwise, the party has to submit objections and
2 state the documents that it is withholding pursuant to those
3 objections.

4 We understand that defendants cannot identify
5 every document that they're withholding when we submit an
6 ESI request.

7 It's not practical. They do need to investigate
8 what they have.

9 The committee notes to Rule 34 contemplate this
10 exact situation.

11 They say that in lieu of identifying the actual
12 documents that you're withholding, the responding party can
13 say, you know, we object on this basis, overbroad relevance,
14 what have you, and we are going to search instead for
15 documents related to 'X' topics between 'Y' dates.

16 And then the parties can thereafter meet and
17 confer about whether that's going to be a sufficient search
18 and production of documents in response to the requests.

19 THE COURT: Okay. Okay. Understood.

20 So it's got its origins in the treatment of ESI
21 but it is a methodology of responding to RFPs that's
22 generally applicable.

23 MR. BLOOM: That's correct.

24 THE COURT: Okay. Okay. Got it. Thank you.

25 So, Mr. Eslick, over to you.

1 MR. ESLICK: As the Court knows, the parties have
2 agreed to produce electronically stored information on a
3 rolling basis in this case.

4 As is set out in our brief, we have a database of
5 approximately 26 million e-mails that we ran Smartmatic's
6 own search terms against. And that necessarily, as the
7 Court might imagine, resulted in a number of documents, tens
8 of thousands of them, that we needed to review for
9 privilege, and responsiveness, and because of the unique
10 character of this case for confidentiality.

11 As the Court knows from the *Cargill* --

12 THE COURT: What's unique about this case, Mr.
13 Eslick? I mean, we deal with sensitive issues all the time.

14 MR. ESLICK: Because in this case, Your Honor,
15 there was a fair amount of back and forth between the
16 parties about Attorneys' Eyes Only information, what
17 qualified as that and then what qualified as confidential
18 information.

19 So in this case determining whether there was a
20 designation at all and if there had to be, whether it was an
21 AEO designation or simply a garden variety confidentiality
22 examination is a extra step.

23 I understand the Court deals with those complex
24 issues all the time and so the Court can appreciate that it
25 takes time to complete that review.

1 THE COURT: Okay. But here's my question:

2 You're doing a review and you are going through
3 this needs to be disclosed, this does not, this needs to be
4 disclosed, this does not, you're using some criteria to make
5 those decisions, correct?

6 MR. ESLICK: Yes, Your Honor.

7 THE COURT: Okay. And what I'm used to seeing in
8 requests to RFPs where a party says that they'll produce
9 things that are responsive but objects to producing more, is
10 they say something along the lines of, We will produce the
11 operating manual and the annual updates to the operating
12 manual but we object to producing e-mails and chat messages
13 among the members of the team that wrote the manual.
14 Something like that.

15 And yours doesn't give any insight into the
16 criteria you're using, it just says we'll produce responsive
17 documents.

18 From that I can't even tell, are 100 percent of
19 documents responsive going to be produced? 1 percent? And,
20 again, What are the criteria?

21 And I think that's what I think Mr. Bloom is
22 saying he's entitled to and at least in the interest of full
23 transparency after reading all the papers, I agree with him.
24 Of course I'm keeping an open mind. I want to hear what you
25 have to see, but that's my question.

1 MR. ESLICK: It's evident from not only the
2 submission of the supplemental responses that we made, but
3 also the letters that memorialize the meet and confer is
4 where the answer to that question lies.

5 We have told Smartmatic's attorneys repeatedly
6 that we will produce documents that are responsive and we
7 will tell them if we have documents we are withholding on
8 the basis of an objection.

9 The exception to that is privilege. Neither side
10 has produced a privilege log yet but I expect that's coming
11 from both sides.

12 So setting privilege aside for the moment, we have
13 told them repeatedly that we will identify documents that we
14 withhold. As of today we don't have any, with the exception
15 of the Dominion issue that we'll get into a little bit
16 pertaining to documents only referring to Dominion.

17 So we're aware that there's a necessity to tell
18 them what we're withholding so that they know whether to
19 push the issue via the meet and confer process and
20 ultimately in a motion to compel, if necessary, if we can't
21 work it out.

22 But as I sit here today, they haven't been told
23 any documents that we're withholding on the basis of any of
24 the objections asserted, again, with the exception of the
25 attorney-client privilege, and work product, and so on.

1 They haven't been told about any of those documents because
2 there aren't any.

3 And if the Court wants us to every week reconfirm
4 that we're not withholding anything or reconfirm with every
5 production that we're not withholding anything on the basis
6 of those objections, we can certainly do that.

7 That may be more than what the rules require, but
8 that's our position and this is not new to the plaintiffs.

9 THE COURT: Okay. That's helpful.

10 And, yes, I think it would be helpful if when you
11 made a production you said no documents have been withheld
12 for nonprivilege or nonwork product reasons. I think that
13 would be useful information because when I read this I
14 didn't know. It sounded -- because it starts with, "Subject
15 to these limitations, comma, we will produce." And I did
16 not realize and I don't know that the average reader would
17 realize that that first clause was describing, at least up
18 to now, nothing at all. So I think that that would be
19 helpful.

20 And as I say, I mean, we'll get to a written
21 order, but I take it, correct me if I'm wrong, that you
22 don't have an objection to if you do withhold things, say
23 we're withholding these because we don't think that
24 documents of the type, fill in the blank, are relevant or
25 proportional or whatever the reason is?

1 MR. ESLICK: That's right, Judge. And that's --
2 an example of that the Dominion-only group of documents that
3 is coming up on next on the batting order.

4 But to respond directly to Your Honor's point,
5 this Court is aware of the *Cargill* case, which is cited at
6 page 7 of our brief on this, which is ECF Number 97, which
7 in essence said, and this is a 2012 opinion, that if we
8 don't assert any objections they're waived.

9 So without having reviewed the documents that
10 we're currently getting through, the risk is that we don't
11 raise an objection then and then find something that is
12 objectionable and then the plaintiffs come back and claim
13 waiver.

14 In that case, this Court said that the defendants
15 can serve their discovery responses and interpose objections
16 to that discovery on whatever grounds they deem prudent and
17 that's what we did.

18 So it was a -- we're cognizant of that opinion.
19 Our goal was to assert objections to the form of the request
20 and then through the meet and confer we have told the
21 plaintiffs that we would identify those documents. If it
22 cleans it up to with every production to say, here's what
23 we're withholding, here's what we're not, we're happy to do
24 that.

25 THE COURT: Okay.

1 Mr. Bloom, back to you. I hear Mr. Eslick saying,
2 and he can jump in if I get this wrong, that if things are
3 withheld, the reasons for the withholding will be described
4 and that to date nothing has been withheld. Is that
5 helpful?

6 MR. BLOOM: It's helpful.

7 I think, as far as efficiency is concerned, I
8 think it would be better if the defendants would respond to
9 our RFPs with the portion of the request itself that they
10 believe is objectionable on a categorical basis.

11 We think that is the proper procedure and then we
12 can more quickly get through the meet and confer process and
13 if necessary be back in front of Your Honor to discuss that,
14 because under the contemplated procedure, you know, we could
15 conceivably get a note from Mr. Eslick in April that says,
16 Oh, by the way, we've actually withheld, you know, all these
17 dozens of documents, you know, because of this reason, this
18 reason and this reason, and then in the middle of
19 depositions, then we have to meet and confer on the document
20 issue and perhaps get back in front of the Court.

21 We would prefer to have those discussions upfront
22 and we think that's the basis for the rule.

23 THE COURT: Okay. Understood.

24 Let me go off-topic for a moment here, because
25 we're talking about document production and Mr. Eslick is

1 talking about document production or document review in the
2 millions.

3 I didn't anticipate this would come up, so I
4 haven't looked at the pretrial scheduling order but do we
5 have a deadline for substantial completion of document
6 discovery in this case and if we do not, is that something
7 we should talk about?

8 I'm not suggesting we'll decide that right here
9 today, but is that something we should put on the table?

10 MR. BLOOM: Your Honor, from the plaintiffs' side,
11 first of all, I don't believe we have that date in the
12 scheduling order.

13 And second of all, plaintiffs would be very open
14 to having that discussion.

15 THE COURT: All right.

16 Mr. Eslick, at the rate you're going, how long is
17 it going to be before these 26 million pages have been
18 reviewed and either turned over or withheld with a reason
19 being given for the withholding?

20 MR. ESLICK: To be clear, Judge, the 26 million is
21 the world that we ran our search terms against --

22 THE COURT: Okay.

23 MR. ESLICK: -- in viewing all 26 million. We
24 would have been here quite a while ago if that were the case
25 based on the proportionality standards. So it's smaller

1 than that.

2 THE COURT: Okay. That's a relief.

3 MR. ESLICK: Yes. As it is for us as well, Your
4 Honor.

5 On our side, and keep in mind that the plaintiffs
6 are availing themselves of the rolling production idea too,
7 on our side an additional 30 days would be substantial
8 completion.

9 Now of course if we find something later we'll
10 turn it over, but the search terms that they have requested
11 we run and the review of those documents I would expect to
12 be completed within 30 days from today.

13 THE COURT: Okay. And maybe it would be helpful
14 if I explained a little what I mean when I say substantial
15 completion, I mean that all search terms have been run or
16 they've been objected to and either you've worked out or
17 I've adjudicated that it needs to be run or it doesn't need
18 to be run, all known document repositories have been
19 searched and documents have been turned over.

20 We all know that no system is perfect. We also
21 know that organizations continue to generate paper. I
22 understand that there will be a few straggler documents
23 coming in after the substantial completion deadline, but it
24 should not be the case that, oh, you know, we've got these
25 servers in Ohio that we still need to look at. That should

1 not be happening. So with that in mind, Mr. Bloom, Mr.
2 Eslick says he'll be done in about 30 days.

3 What is the plaintiffs' best -- and I'm not
4 holding anyone to this, I just want to get an idea of the
5 situation to guide future acts.

6 MR. BLOOM: Your Honor, I think plaintiffs would
7 be more comfortable with a date of substantial completion
8 about six weeks out from now.

9 We did send the defendants another -- a letter
10 that's, you know, about more issues that we need to meet and
11 confer about and so just given the state of document
12 production, and I believe both parties are working
13 diligently to produce documents, that's not what we're here
14 about today.

15 THE COURT: Mm-hmm.

16 MR. BLOOM: But I would just be more comfortable
17 if we set such a deadline about six weeks from today.

18 THE COURT: Okay. Okay. I will do this. I will
19 give the parties until a week from tomorrow to weigh in on
20 what a substantial completion deadline ought to be given the
21 definition of substantial completion that I've just given.
22 And I will -- let's make it a week from today, because then
23 I can -- I honestly think I can get this out on Friday if
24 I've got the input on Thursday. Okay?

25 Any objection to that, Mr. Eslick?

1 MR. ESLICK: No, Your Honor.

2 THE COURT: Mr. Bloom?

3 MR. BLOOM: No objections, Your Honor.

4 THE COURT: Okay. I know you're all busy. I
5 don't mean to just pile on tasks, but I think that would be
6 helpful going forward in a case of this size.

7 All right. Given that no documents have been
8 withheld yet, there's no need, I don't think, to talk about
9 defendants needing to give reasons for withholding.

10 So, Mr. Bloom, do you disagree with that?

11 MR. BLOOM: I'm sorry, I didn't understand your --

12 THE COURT: Yeah, no, sorry.

13 I was going to -- I thought I was perhaps going to
14 be having a longer discussion with Mr. Eslick because I
15 anticipated that at least some documents would have been
16 withheld. Given his response, however, that no documents to
17 date have been withheld, I'm not sure that there's a need
18 for further discussion of that.

19 I think we need to, you know, whether it's 30 days
20 from now or six weeks from now, see what we've got, if
21 anything.

22 MR. BLOOM: Yes, I think that works, Your Honor.
23 Because then as long as we have their position on whether
24 they've withheld anything by that deadline, that would still
25 give us time, I think, you know, to get in front of the

1 Court and to talk about any disputes, you know, before the
2 close of fact discovery.

3 I think, you know, like I said earlier, we would
4 still prefer that they respond now as to what portions of
5 the request they would withhold documents related to. I
6 think that would just help us move things along a little bit
7 quicker, but understand Your Honor's position that with the
8 document production deadline, that will take care of it.

9 THE COURT: Okay. Mr. Eslick?

10 MR. ESLICK: Just two brief notes, Your Honor.

11 First, we have withheld some documents and those
12 are the Dominion-only documents that --

13 THE COURT: Okay. And you've mentioned that.

14 MR. ESLICK: Right.

15 THE COURT: And that was my mistake.

16 MR. ESLICK: I just want to make sure I've made
17 the record clear on that.

18 And then second, there are documents that we have
19 withheld on the basis of a privilege and I expect that the
20 plaintiffs have as well.

21 And neither side has produced a privilege log yet,
22 but I want to make sure that the record is clear that both
23 sides are aware that those documents are out there on behalf
24 of both sides. And we're aware that -- I'm sure that
25 plaintiffs have some, I know we have some.

1 So with those two carveouts that -- I have no
2 objection to the procedure that the Court is proposing. I
3 think it's a splendid idea.

4 THE COURT: Okay. And when are we going to be
5 getting or exchanging privilege logs? Is there anything on
6 that?

7 MR. BLOOM: That's not a topic that the parties
8 have discussed yet. It's something we can easily meet and
9 confer about next week and come up with a schedule for that
10 as well.

11 THE COURT: Okay.

12 Okay. Anything else on this particular point
13 before we move on?

14 MR. BLOOM: Nothing from the plaintiff, Your
15 Honor.

16 MR. ESLICK: Not from the defendants either,
17 Judge.

18 THE COURT: Okay.

19 Let's then, actually the next one that I've got,
20 contrary to Mr. Eslick's expectation, is not the Dominion
21 documents, it's instead Defendants' RFPs 1, 8, and 10, which
22 is seeking source code for products used in California in
23 the 2020 Election, exemplar of Smartmatic products used in
24 California in the 2020 Election, and any hardware or
25 software in Smartmatic's possession, custody or control used

1 in the 2020 Election in any jurisdiction so they can
2 determine whether Smartmatic's products were used outside of
3 Los Angeles County.

4 Mr. Eslick, the plaintiffs have represented in
5 filings with the Court that nothing, that they worked only
6 in Los Angeles County in the 2020 Election.

7 My question is, do you have that in a format that
8 is required under the rules? So do you have a written,
9 signed under oath response saying, we don't have anything to
10 give you outside of Los Angeles County because we didn't
11 work outside of Los Angeles County?

12 MR. ESLICK: Was that question directed to me,
13 Judge?

14 THE COURT: Yes, it was.

15 MR. ESLICK: I'm sorry.

16 THE COURT: Sorry.

17 MR. ESLICK: Well, we're requesting information --
18 maybe I misunderstand the question.

19 THE COURT: Sure.

20 MR. ESLICK: We're requesting the information that
21 Smartmatic has in its possession, custody and control.

22 One of their allegations is that when Mr. Lindell
23 allegedly said that Smartmatic had its technology used in
24 other jurisdictions, that that statement was false. And so
25 if the answer that the plaintiffs can give is, We don't have

1 any other information, they should be required to say that.

2 On the other hand, if they do, then they should be
3 required to produce it because it's relevant and certainly
4 discoverable to the truth of the statement that they claim
5 is false.

6 THE COURT: Okay.

7 So, Mr. Bloom, what form has -- I understand your
8 clients' assertion is they only worked in Los Angeles
9 County. What form has that assertion taken?

10 Because it looks -- I mean, there have been RFPs
11 served and my understanding is if there's nothing, there
12 needs to be a statement saying there's nothing; is that
13 correct?

14 MR. BLOOM: Your Honor, I'm going to let Ms. Ward
15 take over for this motion.

16 THE COURT: Ms. Ward, you have the floor.

17 MS. WARD: That statement is contained in the
18 complaint, I believe, in several places and I believe that
19 statement has also been made in interrogatory responses.

20 I can certainly follow up and ensure that that's
21 the case, but if not, we are certainly happy to provide you
22 a verified statement to that effect.

23 THE COURT: All right. So if you would follow up
24 on that, that would be great.

25 And then, Mr. Eslick, if, in fact, there is a

1 statement that, hey, we only worked in Los Angeles County,
2 then how do I have the authority to order that production,
3 if it's in the hands of the County of Los Angeles and not in
4 the custody of Smartmatic, as they say?

5 MR. ESLICK: Right. And, Judge, I think it's
6 important to recognize on this point what Smartmatic is not
7 arguing.

8 They're not arguing that they don't have exemplars
9 of the code that they created in their archives. We know
10 there's a copy in California. We know that it was escrowed,
11 we know it was taken out of the escrow and used in the 2020
12 Election. And we know that Los Angeles County or the
13 Secretary of State has that. And we have sent subpoenas to
14 obtain that information.

15 THE COURT: Okay.

16 MR. ESLICK: But what Smartmatic has alleged in
17 its complaint is that Mr. Lindell allegedly said that
18 Smartmatic's products were -- and I'm paraphrasing here,
19 Smartmatic's products were programmed to flip votes. They
20 were programmed to cause a particular result in the
21 election.

22 So given that they are claiming that statement was
23 A, made, and, B, is false, Smartmatic's own code that it has
24 is discoverable because the allegation related to
25 Smartmatic, not to Los Angeles County.

1 Now Smartmatic is trying to say, if I'm
2 understanding their briefing correctly, that once we gave
3 them to L.A. County or the Secretary of State in California
4 it was no longer ours. And that's true. There's a license
5 agreement in the contract that was attached to Mr. Bloom's
6 declaration in support of their opposition. And that's why
7 we sent the subpoenas.

8 But I have not heard Smartmatic say that it does
9 not have exemplars of that information. And if they don't
10 have it, then there's nothing to produce and we're back
11 where we were before, they should be required to say that.

12 But to the extent they have their native code in
13 their archives and since their allegations relate to
14 statements about Smartmatic, that's discoverable under the
15 rules because it is embraced necessarily by the allegations
16 in the complaint.

17 So we're talking about two different things,
18 Judge. Category A is what Smartmatic has and that's what
19 they're not turning over.

20 Category B is what L.A. County or the Secretary of
21 State in California has, and that we sent a subpoena for.

22 So bucket two is -- the response date is a few
23 dates away. Bucket A remains to be filled.

24 THE COURT: All right. So, Mr. Bloom -- or Mr.
25 Ward, sorry, what does Smartmatic have that could be

1 responsive to RFPs 1, 8 and 10?

2 MS. WARD: Yes, Your Honor.

3 So in our view the RFPs are very specific and each
4 state or request as an exemplar or the source code in
5 question that was used to administer the 2020 Election.

6 And it's reasonable that it was phrased that way
7 because the defendants' defamatory allegations at issue are
8 that Smartmatic did, in fact, rig or steal the election and
9 that that software was, in fact, utilized to flip votes in
10 the 2020 Election, but it makes sense that that RFP asks
11 specifically for the product or source code that was used to
12 administer the 2020 Election.

13 So the process of certification and testing and
14 implementation of an election technology is really complex
15 and I'm happy to summarize it here for the Court if that
16 would be helpful.

17 THE COURT: No. Let's -- I mean, let me ask the
18 bottom line question and then we can circle back for
19 additional detail as needed.

20 I understand your point that Smartmatic developed
21 this stuff, turned it over to Los Angeles County, Smartmatic
22 can't have it anymore. It's in this vault and don't have a
23 key.

24 Did you keep any copies? Do you have anything in
25 responsive to these RFPs?

1 MS. WARD: What Smartmatic has in its possession
2 is a copy of the source code as it existed basically at the
3 end of its development.

4 We have no reason to believe that this code is
5 different than the code that was utilized by Los Angeles
6 County and installed with the actual machines. And indeed
7 there are a number of safeguards to ensure that that doesn't
8 happen for security reasons.

9 However, because after the source code left
10 Smartmatic's hands, it went through an entire
11 chain-of-custody essentially that Smartmatic wasn't involved
12 in, you know, we can't confirm that that's the case.

13 Defendants' allegations relate to essentially a,
14 you know, a conspiracy to rig or fix an election. And if
15 that's the basis for their claims, which it is, they need to
16 look at the actual source code that was installed into the
17 machines.

18 I think if the Court were to order production of
19 what Smartmatic did to develop copies of the software that
20 Smartmatic does have in its possession, basically we're
21 going to be going back again and again because now we're
22 going to need to review what Las Vegas County received, and
23 then what was held in the escrow account, and then what was
24 removed from the escrow accounts.

25 THE COURT: But did you not say a couple minutes

1 ago that there's no reason to doubt that what you've got in
2 your possession is different from what is in the vault or
3 did I mishear that?

4 MS. WARD: Smartmatic has no reason to think that
5 that is different.

6 Again, the defendants' allegations are that
7 Smartmatic or certain parties were involved in the scheme to
8 rig or fix an election, to the extent that that's their
9 claim, they need to go basically to the source of that
10 claim. What was the code actually applied to the machines?

11 I think this is pretty clear when defendants have
12 already again gone directly to L.A. County to look at their
13 code, that that's the ultimate source of defendants'
14 defamatory statements and the proper source of this request.

15 THE COURT: Turning to the ballot marking devices.
16 Does Smartmatic have those or are those all in the
17 possession of Los Angeles County?

18 MS. WARD: All ballot marking devices used in Los
19 Angeles are all within the possession of Los Angeles County.
20 They're kept in an warehouse owned and operated by the
21 county.

22 THE COURT: What about in the words of RFP Number
23 10, "Any hardware or software used in the 2020 Election."

24 MS. WARD: So the ballot marking device and its
25 associated software are the only products that Smartmatic

1 developed for use the in 2020 Election.

2 To the extent that defendants are going to
3 construe any hardware or software to include things like
4 spare parts, I suppose, spare screws or plastic facing
5 that's used for maintenance purposes, you know, potentially
6 Smartmatic might have some of those, but we would argue that
7 that is not truly, you know, a hardware or software used to
8 administer the 2020 Election.

9 THE COURT: All right.

10 So, Mr. Eslick, I take it you don't want the
11 screws and the spare plastic covers?

12 MR. ESLICK: No, Your Honor. That there are no
13 allegations in the complaint about those things.

14 I would like to respond briefly to a couple of
15 things Ms. Ward's said when I have an opportunity, though.

16 THE COURT: Yeah, that's fine.

17 Why don't we do that now and then we can continue
18 the discussion on this point.

19 MR. ESLICK: Yeah, a couple times Ms. Ward
20 mentioned the defendants' allegations, the defendants'
21 claims. That turns the normal burden of proof on its head.
22 It usually in civil cases the defendant doesn't need to
23 prove anything, it's up to the plaintiffs to prove their
24 claims.

25 And so when the plaintiffs say that Mr. Lindell's

1 statements were false, they should be put to their proof.

2 And if Ms. Ward thinks that there's -- or rather Ms. Ward's
3 client, thinks that there's no difference between the code
4 that it has and it has admitted it has and the escrowed code
5 in California, that's all the more reason to turn it over.

6 Because if, in fact, it turns out that the code is
7 different, that raises another issue as it pertains to the
8 statements that Mr. Lindell is accused of making, namely,
9 that it's easy for Smartmatic's code to be manipulated.

10 So comparing those two is directly relevant to any
11 allegations the plaintiffs have made.

12 And, again, it's the plaintiff who has to prove
13 their case. Mr. Lindell didn't sue Smartmatic and neither
14 did My Pillow, he didn't sue himself. He's here because the
15 plaintiffs have made the allegations that they did and we
16 should be entitled to see what backs up those allegations.

17 So like making a box or a box with not one hand
18 but two hands tied behind his back while sitting on the
19 floor with a blindfold on.

20 THE COURT: Well, that's -- that's, you know,
21 quite a picture.

22 But Mr. Lindell and My Pillow have also put forth
23 the affirmative defense of truth, it's the second
24 affirmative defense in both of their answers, so I don't
25 know that things are quite as binary as all that as they

1 would be in, you know, in a different case.

2 Let's talk then about security. Because if we're
3 going to talk about the source code, let's talk about that.
4 There is a protective order in place in this case.

5 On the other hand, you know, Mr. Lindell has made
6 public statements about how he relishes discovery in a
7 federal lawsuit because he'll get all sorts of things that
8 he can then publicize and then put out there, that those
9 statements are a concern to me. And I don't want to give
10 source code to somebody who's going to put it on the
11 internet.

12 So what can you tell me about that, Mr. Eslick?

13 MR. ESLICK: A couple of responses, Judge.

14 First, if you look at -- if the Court looks at
15 what Smartmatic is actually quoting Mr. Lindell saying, not
16 once does he say, I'm going to violate a protective order.

17 To the extent that there are items that are not
18 confidential he is, I believe, free to do within the
19 confines of the protective order what he wishes.

20 THE COURT: Mr. Eslick, that is an awfully
21 generous reading of his statements. His statements are
22 basically, I look forward to discovery because then they
23 have to give me all this stuff and he also says that he
24 fully intends to make things public.

25 Now, it could be that in his mind he is thinking

1 of course if there's a protective order I can't do that.
2 But I haven't seen that degree of precision in Mr. Lindell's
3 statements, to put it mildly.

4 MR. ESLICK: Then I'll turn -- direct the Court's
5 attention to the protective order in this case and that is
6 Document Number 70 on the Court's docket.

7 There are two levels of confidentiality that I
8 alluded to earlier. Confidential information and Attorneys'
9 Eyes Only or AEO information.

10 And the categories of people that get to see
11 information as marked as AEO are identified in paragraph 9
12 of that order, and that's on page 7.

13 And if the Court compares the categories in
14 paragraph 8, which is the people that get to see
15 confidential information with the categories in paragraph 9,
16 which is the AEO information, the Court will note that it
17 excludes the parties' current employees who are assisting
18 with this litigation and it does not say that Mr. Lindell,
19 himself would receive this information.

20 There are carveouts, you know, the lawyers get to
21 see it, experts get to see it, witnesses or deponents can
22 see it under certain circumstances, but we're reading the
23 Court's order that was entered in November as excluding Mr.
24 Lindell from the category of people who would, you know,
25 much less have custody but not even get to see that

1 information.

2 And this isn't before the Court today, but
3 plaintiffs have been not been shy about designating
4 documents as AEO and they didn't complain about that.

5 So it is odd that this particular issue, this one
6 narrow issue, is somehow being treated differently than the
7 other documents that they have designated under the
8 protective order. That's my response, Judge.

9 THE COURT: You know, and I'll just say I don't
10 think it's odd, because the public facing statements are
11 coming from one particular direction, but I take your point
12 about the protective order and I'll certainly consider it.
13 Okay.

14 Is there anything else that we need to talk about
15 today regarding defendants' requests for production 1, 8 and
16 10, Mr. Eslick?

17 MR. ESLICK: Judge, the only issue we didn't
18 address is the -- I believe that the plaintiffs called the
19 source code "highly confidential" and simply because it has
20 that characterization it should be shielded from discovery.

21 So setting aside Mr. Lindell's alleged statements
22 but just simply the characteristics of that information make
23 it outside the bounds of discovery.

24 And I just want to make sure the Court considers
25 the cases cited by plaintiffs when reasoning through that

1 argument.

2 All the cases that they cite, the plaintiffs,
3 involve information that the plaintiff is seeking from the
4 defendant. So in the cases that they're talking, the *Viacom*
5 case, for example, which is discussed in their brief,
6 involved a lawsuit brought by a plaintiff who then sought to
7 discover information from the defendant.

8 Here it's the other way around. The plaintiff
9 brought these claims claiming certain things about their
10 products and so just because it's highly confidential
11 information, that characterization alone should be
12 insufficient to put the documents requested and the
13 information requested outside of bounds of discovery.

14 I just wanted to make sure to address that point,
15 Your Honor, because we haven't discussed it at this point.

16 THE COURT: Okay. Noted.

17 Okay. Ms. Ward, is there anything else we need to
18 talk about concerning defendants' RFPs 1, 8 and 10?

19 MS. WARD: Sure, Your Honor, just a couple quick
20 points I want to make.

21 With regard to the ability of a protective or
22 confidentiality order to essentially remove the concern for
23 security, you know, I think Your Honor, you know, pointed
24 out statements that have been made written made by Mr.
25 Lindell, which are obviously are of the utmost concern, in

1 addition, you know, Mr. Lindell is currently under
2 investigation by the FBI for crimes relating to proper
3 access of voting machine technology, including specifically,
4 you know, any alleged misappropriation or exfiltration of
5 proprietary software or data, you know that's something
6 that's exactly on point here and that is truly one of our
7 greatest concerns here.

8 In addition --

9 THE COURT: But the AEO designation, I mean, this
10 would go to Mr. Eslick and his colleagues, it would not go
11 to his client. He would never have the chance -- I mean,
12 under Mr. Eslick's view of the situation he wouldn't have
13 the chance to exfiltrate or do any of these other things
14 that you're apprehensive about.

15 MS. WARD: And I want to make sure that we
16 certainly are not alleging or saying that Mr. Eslick or his
17 colleague have any, you know, improprieties or ill motive
18 here.

19 I believe [indiscernible] that that also would
20 extend to inhouse counsel, including inhouse counsel of My
21 Pillow, which is a larger group there. And I think we do
22 have concern that once those documents are in the hands of
23 My Pillow, that Mr. Lindell, as the CEO and owner of the
24 company is going to have some assess to those documents.

25 THE COURT: Okay.

1 MS. WARD: Just one other brief point I wanted to
2 make is, you know, as several of the cases cited in our
3 brief note, the courts will often look as to whether, you
4 know, the discovery sought particularly for something as
5 highly sensitive as a source code is actually necessary not
6 just relevant here. And we've highlighted in our brief that
7 there are innumerable public sources here that show not only
8 are any claims regarding Smartmatic's software source code
9 untrue but to some extent simply impossible.

10 The software and product at issue did not count
11 votes, did not tally votes. Doesn't store or tablet votes,
12 it simply prints ballots. So I think there is a plentiful
13 amount of public information out there that make clear that
14 the factual claims that defendants are trying to test here
15 are simply untrue.

16 And because of that fact, the necessity element
17 simply can't be met.

18 THE COURT: Mr. Eslick, is the standard, in fact,
19 necessary rather than merely relevant when we're talking
20 about highly confidential information such as source code?

21 MR. ESLICK: Under my reading of the rules, Judge,
22 the rules apply to everything equally and there isn't -- my
23 reading of the information provided by Smartmatic, any
24 indication that there is a legal requirement that documents
25 or information having a certain characteristic be necessary.

1 That's certainly not in the rules.

2 But, you know, even if that it is the rule, even
3 if it is necessary to get that, look at the documents that
4 Ms. Ward cited are. They don't say anything about source
5 code. They don't provide an expert analysis of the source
6 code to prove their claims. They discuss election results.
7 There are some public reports that were cited that talk
8 about election security. And that's fine. But that's
9 different than being able to see the actual code that
10 Smartmatic developed to test their claims.

11 And with all due respect to the public agencies
12 that issued those, just because they issued those statements
13 does not make Smartmatic prevail. That's for the jury to
14 decide. And discovery is broad. The documents are clearly
15 relevant. And we would assert they are necessary to prove
16 or disprove the claim that Smartmatic's products can be
17 manipulated in an election.

18 So the standard is not necessary, Your Honor, but
19 even if it is, it's certainly necessary here.

20 THE COURT: All right. All right.

21 Now, let's turn to what Mr. Eslick's been
22 anticipating, the Dominion-only documents.

23 So will it be you, Mr. Bloom, or Ms. Ward?

24 MR. BLOOM: It will be me, Your Honor.

25 THE COURT: So why is it, and I know you wrote

1 about this, but help me understand why it is that you need
2 or are entitled to under the rules, documents that don't
3 even talk about your client that are just about Dominion.

4 MR. BLOOM: No problem, Your Honor.

5 So we've alleged that the defendants made many
6 false statements about us and our relationship with
7 Dominion. These statements are in a few different
8 categories.

9 They say that we had a corrupt relationship with
10 Dominion to rig the 2020 Election and they also say that
11 Dominion was using our source code, our software, in their
12 own machines that were hacked or manipulated.

13 And so in order to show that there are actual
14 malice, defendants' actual malice, that is that they knew
15 what they were saying was false or were reckless as to the
16 truth, we need to show what they knew about Dominion and not
17 just documents that are going to say, Dominion had no
18 relationship with Smartmatic.

19 We think that documents that relate specifically
20 to Dominion and only Dominion are also going to be probative
21 of the knowledge that defendants had related to their --
22 related to Smartmatic's relationship with Dominion. And so
23 we've cited an example here.

24 If you have a, we'll call it a dossier on Dominion
25 that does not mention Smartmatic, it might still have

1 information that by inference relates to the false
2 statements at issue in this case, that was kind of
3 confusingly put.

4 So in this dossier, if the information provided to
5 Mr. Lindell says that Dominion, who had its origins in
6 Canada, Dominion, they use this equipment and this software,
7 even if there's no comparison to Smartmatic in there, that's
8 still going to put defendants on notice that Dominion has no
9 ties to Venezuela and Smartmatic. Dominion was not using
10 Smartmatic's source code.

11 And so that's all evidence that we would like to
12 be able to show it the jury to further establish that what
13 they knew what they were saying about Dominion as it related
14 to Smartmatic was false.

15 THE COURT: All right. Now a couple of things.

16 There were some quotes in the papers that were
17 submitted to the Court and it wasn't clear to me whether
18 these were direct quotes from Mr. Lindell or not. And the
19 one that I'm particularly zeroing in is the use of the word
20 "conspired," as in, Dominion and Smartmatic conspired or
21 were coconspirators or were in a conspiracy.

22 Is that -- and if you can't answer it, you know,
23 here today, is that a quote from Mr. Lindell? Are those
24 words that he used?

25 MR. BLOOM: Yeah, Your Honor.

1 I can't quickly find the quote in the brief. But
2 what I can tell you is that we have asserted in our
3 complaint statements, several statements I believe, where
4 Mr. Lindell stated as a quote, "Smartmatic was the
5 Mothership of this conspiracy," you know, to rig the
6 election. So that's clearly at issue in our case.

7 THE COURT: All right.

8 So, Mr. Eslick, go over to you. If, in fact, Mr.
9 Lindell has made statements like "Smartmatic is the
10 Mothership of this conspiracy," then my understanding of
11 conspiracy law is that all conspirators are all agents of
12 other conspirators and if he has made statements like that,
13 it does seem to me that he is putting at issue the
14 relationship or his state of knowledge between Smartmatic
15 and Dominion.

16 And so if there is a document in Mr. Lindell's
17 possession or My Pillow's possession that would show, for
18 example, that Dominion got booted out of Venezuela in 1935
19 and has never been allowed back in, to take an example that
20 strikes me as something that needs to be disclosed. Is that
21 correct or not correct?

22 MR. ESLICK: Judge, I have two responses to your
23 question.

24 THE COURT: Okay.

25 MR. ESLICK: The first response is in the examples

1 that Mr. Bloom referenced, he kept saying Smartmatic over
2 and over. That Smartmatic was the Mothership, for example,
3 as one of the examples that he provided.

4 The Court will note from looking at our briefing
5 that there are three broad categories of documents that we
6 have agreed to produce, documents that relate to Smartmatic
7 of course are discoverable. If they relate to Smartmatic
8 and another machine company or voting technology company
9 that would be produced and that would include Dominion as
10 well.

11 And then if there's a document that references
12 voting technology companies generally without naming names,
13 those are being produced as well.

14 So you can't have a conspiracy of one, it requires
15 two. And I would agree with the Court's interpretation of
16 conspiracy law, at least in the civil context, but the
17 documents where that if there are documents that say
18 Smartmatic and Dominion have nothing to do with each other,
19 that would be in the group that we have agreed to produce.

20 THE COURT: It would, but I'm talking about a
21 different example. A document that speaks only of Dominion,
22 does not speak about Smartmatic, but nevertheless contains
23 information that makes it clear that Dominion is more likely
24 or less likely to be able to conspire with Smartmatic,
25 because that goes to, I think, the state of mind of Mr.

1 Lindell or the state of knowledge of Mr. Lindell when he
2 made the allegedly defamatory statements that Smartmatic and
3 Dominion were coconspirators.

4 MR. ESLICK: If that is the interpretation that
5 the plaintiffs are advancing of their document request, that
6 is news to me.

7 THE COURT: It's not -- it's what I'm taking away
8 from the briefing.

9 MR. ESLICK: Then that interpretation -- if the
10 interpretation is that if a document relates to Dominion
11 only as it pertains to the allegations in the complaint,
12 then I would concede that that is probably discoverable.

13 The two categories they have asked for, though,
14 are all the documents that were produced in any way in the
15 companion -- in what we have called the D.C. case, the case
16 involving Dominion out in D.C.

17 And setting aside the point that proposing those
18 documents would violate the protective order issued by Judge
19 Nichols, it's hard to see how every document referring to
20 Dominion in our world of 26 million e-mails is relevant to
21 any of the claims.

22 But if the Court orders that that request be
23 narrowed to fit the allegations in complaint, I would
24 concede those documents are discoverable.

25 THE COURT: Okay.

1 Mr. Bloom, if the documents cannot be made to be
2 relevant to the allegation in his your complaint, then how
3 could Dominion -- other than showing state of mind, because
4 here's a Dominion document that says, the code on these, you
5 know, doesn't talk with other machines or things like that,
6 can you give me an example of something outside that
7 definition that would be relevant and discoverable?

8 MR. BLOOM: I'm sorry, Your Honor, I didn't mean
9 to interrupt.

10 THE COURT: No, no.

11 MR. BLOOM: Your Honor, we are the position that
12 any information relating Dominion here is reasonably
13 calculated to lead to relevant evidence.

14 I struggle to think of a example of a document
15 that's in Mr. Lindell's possession about Dominion that would
16 not bear on anything at issue in this case. You know, I
17 suppose you could have a document that mentions the country
18 club memberships of a Dominion employee. I mean, that would
19 be the type of thing that would be fully irrelevant.

20 But any information about Dominion, its origins,
21 its technology, its equipment, we think that's all going to
22 be relevant to our claims in this case.

23 And so we think the more workable solution is just
24 to require defendants to produce all their documents related
25 to Dominion.

1 And we haven't talked about burden here. You
2 know, they haven't said that that's going to be too
3 burdensome, they are running our search term that just
4 relates all to Dominion and we just don't understand what
5 the problem is.

6 THE COURT: Okay. Now you just gave the standard
7 as reasonably calculated to lead to discoverable
8 information, is that -- is that correct?

9 MR. BLOOM: No -- it was the standard, I think,
10 you know, we're talking about relevant information.

11 We think that anything outside of, you know, sort
12 of the example that I just gave about, you know, something
13 that's wholly unrelated to the technology, to contracts, you
14 know, that that would not be relevant. But anything we
15 think that relates to Dominion's business, its equipment, we
16 think that's all going to be inclusive, it's going to be
17 relevant.

18 And just for the record, as long as I'm chatting
19 right now, the defendants mentioned in their brief they
20 think this is a scheme to get information about our
21 competitor. I just want to say for the record that that is
22 not the case and we're just trying to prove up our claims
23 here.

24 THE COURT: All right.

25 So, Mr. Eslick, I am, you know, again what I say

1 today is what I say today, there will be something in
2 writing coming, but listening to the conversation you must
3 realize that it's probable that you're going to be told that
4 some Dominion-only documents are discoverable if they go to
5 informing Mr. Lindell's state of mind about Dominion and,
6 therefore, its capacity to or not to be a coconspirator of
7 Dominion -- or of Smartmatic, I'm sorry.

8 Mr. Bloom raised this, you did not, and that's
9 burden.

10 MR. ESLICK: Judge, I think that the -- and I'm
11 speculating a little, so give me a lit of leeway, I believe
12 that the world of those documents, the Dominion-only ones,
13 that are relevant to any parties' claim or defense, which I
14 think is what the standard is, is going to be fairly small.
15 I don't anticipate burden being an issue there, particularly
16 with respect to the other productions that we're already
17 doing.

18 THE COURT: Okay. All right.

19 Let's see where we are next.

20 Anything further on this particular point, Mr.
21 Bloom?

22 MR. BLOOM: No, Your Honor.

23 THE COURT: Mr. Eslick?

24 MR. ESLICK: No, Judge.

25 THE COURT: Okay.

1 Let me just get to the next -- I lost my cursor.
2 Here we are. All right.

3 So I think with that, next we've got Smartmatic's
4 interrogatory number 9, "All communications defendants had
5 with Mr. Trump, his administration, his campaign, and the
6 republican national committee."

7 My understanding is that there's not really a
8 dispute about documents but there is about oral statements.
9 Is that accurate, Mr. Bloom?

10 MR. BLOOM: That is my understanding based on
11 their briefing.

12 THE COURT: Okay.

13 And, Mr. Eslick, what is the concern with
14 disclosing oral conversations that have not been captured in
15 a written document?

16 MR. ESLICK: And I'm confident that the
17 plaintiffs' attorney will point out if I'm reading this
18 incorrectly, but interrogatory 9 asks for all communications
19 or interactions, regardless of what the subject is.

20 And it's difficult to see how a conversation about
21 something completely unrelated to the claims and defenses
22 would be discoverable.

23 The other piece of this, Your Honor, is it's
24 difficult for anyone, much less a busy CEO, to remember
25 everyone -- to recount every conversation, where it

1 happened, when it happened, what was said, and who was there
2 years after the fact.

3 Now, we are aware of one oral communication that
4 occurred -- and this is a supplement that we can make, we
5 are aware of one oral communication that occurred sometime
6 in October or November of 2020 between Mr. Trump and Mr.
7 Lindell that related to the election in Minnesota. It was
8 something along the lines of, Do you think I'm going to win
9 Minnesota? That's not relevant to L.A. County. It doesn't
10 mention -- the conversation didn't mention Smartmatic, it
11 didn't mention voting technology at all.

12 And they will have the opportunity to depose Mr.
13 Lindell and ask him, As you sit here today, what do you
14 remember speaking with Mr. Trump about as it pertained to
15 the claims and defenses that are in the case?

16 So that is the response that I have, Judge.

17 THE COURT: Okay. But with respect to memory, I
18 mean, I understand that Mr. Lindell moves in probably faster
19 circles than I do, but I should think I would remember a
20 conversation with the President of the United States. Just,
21 you know, I understand if there's a conversation with the
22 campaign field director in Arkansas, maybe that's less
23 memorable.

24 But I don't know that a blanket assertion that we
25 can't answer because there are some that can't be remembered

1 is going to hold up.

2 MR. ESLICK: Judge, I have given the response that
3 I have on that point.

4 THE COURT: Okay.

5 MR. ESLICK: And as I said, we have at least one
6 supplement to make on that point.

7 If the Court is inclined to grant this portion of
8 the motion, though, I would -- I would urge the Court to
9 tailer any sort of compelled response to the claims and
10 defenses.

11 THE COURT: Well, sure, yeah.

12 Mr. Bloom, what about -- I mean, Mr. Eslick's
13 point is you're going to take a deposition.

14 Isn't a deposition the place for this rather than
15 an interrogatory, particularly, I mean I'm just sort of
16 asking it out there, I think you mentioned in your papers a
17 January 15th visit to the White House, that's a matter of
18 public record, it was covered in the news, you can ask Mr.
19 Lindell about it.

20 What is -- what is behind this interrogatory and
21 why is it a righteous interrogatory?

22 MR. BLOOM: Sure, Your Honor.

23 We think that the approach that the Court used in
24 the *Marco Techs* case which we cited is very workable and
25 appropriate here, where all the Court said was for oral

1 communications you need to identify when it took place, who
2 the parties were, and what were the topics discussed.

3 And as to your more general question as to why we
4 need that now as opposed to when we depose Mr. Lindell,
5 we're not sure when we're going to depose Mr. Lindell yet,
6 and we need the identities of the individuals whom he was
7 speaking with from the Trump campaign, the Trump
8 administration and from Trump himself so that we can serve
9 proper discovery before the close of discovery. Whether
10 we're going to serve documents subpoenas only or documents
11 subpoenas with a deposition subpoena, that's -- this is all
12 information that we'd like to have on the front end rather
13 than waiting for our deposition of Mr. Lindell.

14 THE COURT: All right. I that was -- that was all
15 well-briefed, but in this particular one I don't really have
16 a lot of questions but, Mr. Eslick, if either of you has
17 anything further on this point we can talk about it,
18 otherwise we will move on.

19 MR. ESLICK: I don't have anything further, Judge.

20 MR. BLOOM: Nothing further from the plaintiffs.

21 THE COURT: Okay.

22 Smartmatic's interrogatory 15 asks the defense to
23 identify the metrics they use to estimate how many people
24 viewed the statements at issue in this case.

25 It looks to me as though the defendants have said

1 that they will respond to this and I am wondering, Mr.
2 Bloom, whether that makes this moot.

3 It says, at least my notes indicate, "Defendants
4 now clarify they have metrics data from a third-party and
5 that all metrics data has been or will be disclosed." And
6 that's defendants' memo in opposition to your motion to
7 compel at page 18.

8 MR. BLOOM: Your Honor, we appreciate that they've
9 agreed to produce responsive documents.

10 We would still prefer that they answer the
11 interrogatory in writing to identify the sources themselves.
12 In particular we're interested in the source they were
13 referring to in the podcast that we cited with Rudy Giuliani
14 where Mr. Lindell clearly referenced the cite that we track,
15 and then there's a quote from him, you know, "We're not sure
16 whether there's going to be responsive documents to that.
17 It may just be something that they monitor using the
18 internet or another tool for all we know."

19 And so for that reason, we would prefer that they
20 -- that they actually identify the sources in writing.

21 THE COURT: All right.

22 So, Mr. Eslick, then going to Mr. Lindell's
23 appearance on Mr. Giuliani's podcast, I think it was on the
24 15th of February where he said, allegedly, "That 100 million
25 people had viewed absolute proof and that that on average

1 they had spent an hour and 53 minutes doing so."

2 The 100 million, you know, sounds like the sort of
3 thing people say. The hour and 53 minutes, that's awful
4 precise.

5 So I think that, and again I'm keeping an open
6 mind and I want to hear what you have to say about this, but
7 I do think that Mr. Bloom is probably correct in that you've
8 got to say, he got those numbers from 'X' or he didn't have
9 a source.

10 MR. ESLICK: And that's a fair point, Judge. And
11 I think you identified perhaps correctly that hyperbole is a
12 feature, a potential feature of some of the rounder numbers.

13 As it pertains to the specific one that Your Honor
14 mentioned, if the Court is inclined to require us to,
15 require our clients rather, to say, Here's where I received
16 that figure or I don't have a source for that, it's me
17 speaking that that's the source, that is something we can
18 certainly clean up.

19 THE COURT: Well here's my question:

20 I mean, this is an interrogatory that has been
21 served. There's -- you haven't identified anything that's
22 facially wrong with the interrogatory or that would excuse
23 performance.

24 Why I do need to come in and say you need to
25 answer the interrogatory?

1 MR. ESLICK: The way this came up in the meet and
2 confer, Your Honor, is the Smartmatic gave us -- I don't
3 know if it was part of the record or not, a document that
4 was produced in the Dominion case, this is one with that
5 protective order out in D.C.

6 THE COURT: Mm-hmm.

7 MR. ESLICK: And said, Look, here is an example of
8 metric data and we went back to our client and said, This
9 looks like metric data.

10 The response, and this is at page 18 of our
11 opposition, is that this information wasn't used by our
12 clients to monitor internet usage because it wasn't reliable
13 and we provided that information back to plaintiffs.

14 If the position all along was, here is a statement
15 that was made about viewership and time, where did you get
16 it or did you make it up? That is -- that is certainly not
17 what the interrogatory says, it just asks for all metric
18 data.

19 THE COURT: Okay. Mr. Bloom, is this a problem
20 with the drafting of the interrogatory or is there more to
21 it than that?

22 MR. BLOOM: No, Your Honor. I don't think it's a
23 drafting issue.

24 I think it's pretty clear from Mr. Lindell's
25 statements when he's talking about the millions of people

1 viewing, you know, programs that he's -- that he's getting
2 it from somewhere, that the documents that we've cited are
3 consistent with that, and we think that they need to be
4 identifying where that information came from.

5 THE COURT: All right. Under advisement.

6 Smartmatic interrogatory 18A asks for the identity
7 of the My Pillow's employees who input codes into the
8 system. And there was something else, I believe. Okay. It
9 looks -- it looks that -- it looks like that's all it calls
10 for.

11 Mr. Eslick, it looks to me your response is a My
12 Pillow put it in. That could means there's a guy who was --
13 that's their job. That could be mean that in the morning
14 somebody is sent to unload trucks and somebody else is sent
15 to input codes and that changes from day-to-day. That could
16 cover all sorts of things.

17 And I think Mr. Bloom has asked, and I think again
18 my first impression, is probably entitled to identities.

19 Now, I also anticipate that's just going to tee up
20 a further motion, which is to quash the deposition notices,
21 but we'll cross that bridge when we get to it.

22 But why would plaintiffs not be entitled to
23 identifying information for the employees who input the
24 codes?

25 MR. ESLICK: A couple of responses, Judge.

1 And I'll start at page 14 of our opposition and
2 this is Document 97.

3 If it is not clear in the interrogatory answers,
4 the brief states that three are employees who perform that
5 function.

6 THE COURT: Okay.

7 MR. ESLICK: That's the first part.

8 So there's more than one person that we would need
9 to track down, assuming that we even can do that now.

10 The My Pillow employees aren't like lawyers where
11 we have to write down what we do all the time. So it might
12 be a person in the morning that did it different from a
13 person in the afternoon that provided that information.
14 That's the first response.

15 But the second response is what good is it? The
16 only task that this person has is to take a promotional code
17 that they don't develop that they have no input in creating
18 that they are simply told and tie that to a promotional
19 discount.

20 For example, promotional code ABC might mean a
21 10 percent discount on a product. All that person does is
22 go into the computer system and say, Code A, B, C equals ten
23 percent discount. And the relevance from that testimony
24 from that individual is minimal at best. They don't do
25 anything other than in essence flip a switch to activate the

1 code.

2 We've identified the individuals that --
3 individual rather, that creates and develops the code. And
4 only through a very liberal interpretation of the word
5 "use", would that person's identity or existence even be
6 known.

7 THE COURT: Well, that's -- why though, isn't the
8 plaintiff entitled to ask these employees themselves rather
9 than taking counsel's representation as to their job duties?

10 MR. ESLICK: My understanding, Judge, is that this
11 was an interrogatory answer executed under oath.

12 So it isn't just my representation, they have
13 something that they can talk to Mr. Lindell about if they
14 decide to.

15 Again, if the -- if the -- I have yet to get a
16 meaningful response at any of the meet and confers that I
17 have had with the plaintiffs' lawyers about how the identity
18 of a person who inputs a piece of code to flip a switch to
19 activate a promotional discount, how the identity of that
20 person is relevant to any of the parties' claims and
21 defenses.

22 THE COURT: All right.

23 MR. ESLICK: Certainly --

24 THE COURT: Mr. Bloom, it sounds like Mr. Eslick
25 has -- I couldn't put the challenge -- I couldn't possibly

1 put it any more clearly.

2 If all this person does is say, ABC code equals
3 10 percent off and flips a switch, what's the relevance of
4 the person's identity?

5 MR. BLOOM: Well, first of all, Your Honor, I'd
6 just like to point out the idea that Mr. Lindell -- the
7 interrogatory itself requests the identities of all My
8 Pillow employees who had anything to do with the creation,
9 development or implementation of these promo codes that were
10 used in the programs in which defendants defamed us.

11 It seems totally implausible that Mike Lindell
12 creates the code and just hands it off to one low-level
13 employee who puts it into this, you know, whatever program
14 we're talking about here.

15 And so we want to get -- we want to know exactly
16 what's going in on this operation, whether there's a
17 director of marketing involved, whether there are other
18 people involved too, because this all goes to the vicarious
19 liability. This all goes to their involvement in the -- in
20 promos -- in the promo codes that are use, to gain revenue
21 based on defaming us and so that's all going to be relevant
22 to our claims.

23 Now, as to the more micropoint about the identity
24 of that individual, I think Your Honor put it best when you
25 said why should Smartmatic have to take it at their word

1 that that's all the employee does and I think we're entitled
2 to their identities so that we can find out for ourselves
3 whether it is really that simple.

4 THE COURT: All right. Mr. Eslick, I'll give you
5 the last word on this and then we'll move to interrogatory
6 22, which I think is the last one.

7 MR. ESLICK: I think so, too, Judge. I really
8 don't have anything else to add.

9 THE COURT: Okay.

10 MR. ESLICK: The interrogatory answer says what it
11 says.

12 THE COURT: All right. Fair enough.

13 Let's move to number 22. And, again, I
14 congratulate the parties because this has been narrowed down
15 it is, I think, a nice, well-defined issue.

16 As I understand it, Mr. Bloom or Ms. Ward, correct
17 me if I'm overstating things, it looks like the objection at
18 this point is that the defendants have said that because the
19 duties and responsibilities of a chief executive officer and
20 chairman of the board are well-known we don't need to go any
21 further than that. Is that correct?

22 MR. BLOOM: That's my understanding of the
23 defendants' position, Your Honor.

24 THE COURT: Okay. And then one just clarifying
25 question, I think I know the answer but I guess I'm looking

1 for confirmation, was this interrogatory objected to by the
2 defendants as to the portion that's before us here this
3 afternoon, the duties and responsibilities part?

4 MR. BLOOM: My understanding, Your Honor, is
5 that -- I'm sorry, I'm just trying to quickly find it so I
6 can give you an accurate answer.

7 MR. ESLICK: If it helps move things along, it's
8 Document 81-9.

9 THE COURT: Thank you.

10 MR. ESLICK: Page 4.

11 MR. BLOOM: Right. So defendants in response they
12 just say, "At all relevant device times Mr. Lindell was My
13 Pillow's CEO and Chairman of the Board." Right. So there's
14 no objections, Your Honor.

15 THE COURT: All right.

16 So, Mr. Eslick, what is the problem with
17 explaining what -- I mean, I get chairman of the board is a
18 well-known term, CEO is a well-known term. But there is a
19 difference between being the CEO and chairman of the board
20 of an airline, a publishing house, a Silicon Valley startup,
21 and a pillow company in Minnesota, and companies can assign
22 all sorts of different duties and responsibilities to their
23 CEO and chairman and it's got a lot of flexibility there.

24 MR. ESLICK: Your Honor, this is set forth in our
25 -- in our briefing on this point.

1 Our position is that this is -- this is a
2 sufficient answer to the interrogatory because the general
3 tasks that a CEO or a chairman of the Board of Directors
4 does is not a unique item and I think Your Honor may have --
5 may have identified that issue already.

6 If the interrogatory is to be interpreted to
7 require Mr. Lindell to list every single thing he did from
8 January 2018 to the present, every single task he did,
9 again, it's difficult to see the relevance of that response
10 to the claims and defenses.

11 So there isn't an objection because we think the
12 answer is sufficient. Clearly the plaintiffs think
13 otherwise and the Court may order otherwise, but because
14 these are not unique positions that are well-known, our
15 position is that the answer is sufficient as it reads now.

16 THE COURT: Okay. And I'm not thinking of having
17 him catalog everything he did every day from, you know, 2017
18 forward, but, I mean, we've all read job vacancy
19 announcements when they say, you know, the incumbent is
20 expected to do A, and B, and C, and they have
21 responsibilities for X, and Y, and Z I think that's what the
22 plaintiffs are looking for but let's found out.

23 Mr. Bloom?

24 MR. BLOOM: That's correct, Your Honor. This,
25 like the other request we discussed, links to the vicarious

1 liability.

2 As the Court's well aware, our burden to prove up
3 vicarious liability is to show that Mr. Lindell defamed
4 Smartmatic within the course and scope of his employment and
5 we're just looking for basic information here about what
6 that scope of employment is and so we think that his duties
7 as CEO and chairman of the board are clearly relevant to
8 that topic.

9 THE COURT: All right. All right.

10 Is there anything else? With interrogatory number
11 22, we've gotten to the end of my list. Did I miss any?

12 MR. BLOOM: Your Honor, I don't think we discussed
13 interrogatory numbers 19 or 1. And I don't know if that's
14 because you don't need to hear argument about it or
15 otherwise.

16 THE COURT: Let me just refresh myself as to what
17 those are about.

18 Oh, yes, oh, yes. 19 we should talk about. That
19 talks about advertisements, product deals or promotional
20 codes related to various things generally associated with
21 the 2020 Election and then discloses associated revenue.

22 So, Mr. Bloom, I did read what you wrote about
23 relevancy on number 19. I'm struggling a little bit with
24 it. In that I'm -- it appears to me that you're using
25 revenue derived as a proxy for importance or a degree of

1 defamation or I don't know what.

2 But what are you measuring when you measure --
3 when you know the revenue, what does that tell you that's
4 important?

5 MR. BLOOM: Your Honor, that gives context to our
6 allegations and our claim that one of the reasons that Mr.
7 Lindell has defamed us and has continued to defame us for
8 several years now or multiple years I should say, he was
9 motivated by a profit, not only to curry favor with
10 President Trump himself but to sell additional products to
11 followers of Mr. Trump, supporters of Mr. Trump.

12 And so we think the promo codes are an essential
13 part of that story. That Mr. Lindell was using these promo
14 codes, creating them, and then using him in his defamatory
15 broadcasts in order to generate more revenue.

16 And we believe that that's relevant evidence not
17 of vicarious -- My Pillow's vicarious liability but also Mr.
18 Lindell's actual malice because it shows his ill will and
19 improper motive, which we believe in the cases show is
20 relevant to the actual malice inquiry.

21 THE COURT: All right.

22 So, Mr. Eslick, it sounds to me like Mr. Bloom is
23 looking for motive evidence. Is that your understanding or
24 is your understanding different?

25 MR. ESLICK: I think that's -- that's one way to

1 understand this interrogatory.

2 THE COURT: Mm-hmm.

3 MR. ESLICK: But the issue we have with this
4 interrogatory isn't so much about the content, in fact, we
5 did produce recently promo code revenue data for the codes
6 that they did list. And those are the ones that are in
7 interrogatory -- we're calling it 18A, but it's
8 interrogatory 18, there's footnote that explains that.

9 THE COURT: Yeah.

10 MR. ESLICK: We did produce that.

11 But if the Court looks at the scope of what this
12 interrogatory requests, it is exceptionally broad. And this
13 is one that we would claim burden on.

14 All of those capitalized words in interrogatory
15 19, all 1, 2, 3, 4, 5, 6, 7, 8, 9 -- you know, almost 10 of
16 them are defined terms.

17 And if you go to the definitions that accompanied
18 the interrogatories, those defined terms incorporate other
19 defined terms. And one of the defined terms contains a
20 reference to approximately 30 or 25 paragraphs of the
21 complaint.

22 So if the plaintiffs want to know revenue data for
23 specific promo codes, they should ask for it. It's improper
24 and unduly burdensome for us to imagine what they think are
25 the defamatory broadcasts, watch them all, mine them for

1 promotional code data, and then produce responsive
2 documents. They clearly know how to ask for information
3 about specific promo codes because they did it in
4 interrogatory 18.

5 So it's more of a scope issue at this point,
6 Judge, as opposed to a content issue.

7 THE COURT: All right.

8 So, Mr. Bloom, if I'm hearing Mr. Eslick
9 correctly, content is not a problem but burden is. And if
10 you want to know about a specific promo code, ask and you
11 shall receive.

12 And so can we do it that way or are we going to
13 need to have a knock-down, drag-out about burden and
14 proportionality?

15 MR. BLOOM: Well, Your Honor, I think our response
16 to that is that we've -- we don't understand the burden
17 argument.

18 We've clearly defined which programs where we're
19 talking about in our complaint the ones that contain the
20 defamatory statements. I think all we're asking them to
21 find themselves is to identify promo codes that relate to
22 Donald Trump. And I can't say what My Pillow's systems are,
23 but we don't understand why that information should be so
24 difficult to ascertain. It's certainly in their possession,
25 custody or control. We just don't understand the burden

1 issue here, I guess.

2 THE COURT: Well, I'll tell you what, let's do
3 this, let's segue into interrogatory number 1, because I
4 think that's relative to what we're talking about here,
5 which is your request that Mr. Lindell and My Pillow recount
6 all the statements Mr. Lindell said about Smartmatic,
7 including when he made them, where he made them, and all
8 republications which is a term you have since narrowed.

9 But is this, perhaps, not illustrative of what Mr.
10 Eslick is talking about in that a subset of statements about
11 Smartmatic are allegedly defamatory statements about
12 Smartmatic and then you need to look at those and find out
13 what promo codes were mentioned and then go get the revenue?

14 MR. BLOOM: Well, with respect to the promo codes,
15 again, we think it's a very narrow universe. We've
16 identified very specific programs. And I'll get to how that
17 relates to interrogatory number 1 in a second, but this
18 isn't, you know, dozens of hours of footage. Mr. Lindell
19 himself should know what promo codes are in these very --
20 there's four documentaries, there's some podcast appearances
21 and some other appearances, this isn't an endless universe
22 of moments when he was, you know, this isn't an endless
23 universe of moments in our complaint, it's very defined.
24 We've --

25 THE COURT: In interrogatory number 19, have you

1 specified, you know, at a rally in Phoenix on such and such
2 a date, this promo code, you know, and then you can go watch
3 that and see what promo codes are used or is it more
4 generally as to allegedly defamatory statements?

5 MR. BLOOM: It falls into both buckets, Your
6 Honor. We defined in interrogatory number 19, we request
7 the promo codes related to, for example, the defamatory
8 broadcasts, and that's a term that's defined and includes
9 citations to our complaint to specific statements, to
10 specific publications.

11 The promo codes related to Donald Trump and the
12 Trump administration, that's not something we have defined,
13 that would be more generally what promo codes do you have
14 that relate to Donald Trump.

15 THE COURT: So there would need to be research to
16 be done on that.

17 MR. BLOOM: That's correct.

18 THE COURT: All right.

19 Mr. Eslick, if there -- if the plaintiffs have
20 identified specific publications or if the accused
21 statements are defined with precision, does that help with
22 your burden argument as to number 19?

23 MR. ESLICK: Two points on that, Judge, and then
24 I've got a response to something Mr. Bloom said.

25 First, if it is not that hard to do, then the

1 plaintiffs would have done it.

2 They would have said like they did in
3 interrogatory 18A, here are a list of codes, let us know the
4 revenue. That's the first point.

5 Second point I'll make really has two parts. The
6 burden argument is going to come up again if the plaintiffs
7 go and mine these programs for promotional codes and come
8 back with a list of 300. And so the -- the Court's
9 characterization that will, I think the Courts had asked if
10 you receive as true, to the extent that we don't get a long
11 list of promotional codes, the substantive response is
12 this:

13 Let's just take one of the defined terms in
14 interrogatory 19 and that is the term "accused programs",
15 and I want to just walk the Court through our thought
16 process on this.

17 So any advertisement, and that is something other
18 than promo codes, but any advertisement, product deals or
19 promotional codes using the disjunctive, related to the
20 defamatory broadcast and why don't we just -- or, excuse me,
21 the accused programs, first of all, it's very difficult if
22 not impossible to track revenue from an advertisement.

23 If you publish an ad in the newspapers and you
24 buys a product they're not going necessarily going to say,
25 Hey, I saw your ad. It's easier with promo codes because

1 they have to type that in.

2 The accused programs are all of the internet
3 programs, radio programs, television programs, and
4 documentaries identified in paragraphs 81 through 108, 110
5 through 116, and 117 through 126 of the complaint, including
6 a few that are specifically identified.

7 So the notion that they're, you know, it's just a
8 couple of hours of listening to a video and when you hear
9 promo code, type it in, is not necessarily what the
10 interrogatory says.

11 And it gets worse because defamatory broadcasts
12 also has a definition and it's any -- any broadcast and a
13 complete program in which any of the defamatory statements
14 appeared and defamatory statements is defined to be
15 including without limitation the statements identified in a
16 whole series of paragraphs. And that's in document 81-4 at
17 page 3.

18 So the responsive is two-fold.

19 If it's really that easy, the plaintiffs can just
20 do it. If it's not that easy, then they should narrow
21 interrogatory 19 to satisfy the burdens -- the burden
22 argument that we raised earlier.

23 THE COURT: Okay. And then you also had something
24 you wanted to respond to Mr. Bloom on?

25 MR. ESLICK: I did that with --

1 THE COURT: You did that.

2 MR. ESLICK: Sorry, Judge.

3 THE COURT: Nope. That's fine.

4 MR. ESLICK: Trying to move things along.

5 THE COURT: I appreciated that. This is turning
6 into a long afternoon.

7 This is one I'm going to have to dig in on a
8 little bit. I still want to get this written as soon as I
9 can, but I think that I'll just -- I'll need to go through
10 this interrogatory and go through its various component
11 parts and look at the definitions.

12 MR. BLOOM: Your Honor, could I also quickly go
13 back to interrogatory number 1?

14 THE COURT: I was just about to turn to
15 interrogatory number 1.

16 So interrogatory number 1 is, "All statements Mr.
17 Lindell made about Smartmatic. When he made them. Where he
18 made them. All republications."

19 And it looks like you've subsequently limited that
20 had to the accused programs and that are you are only
21 looking for republications that came from the defendants and
22 it wouldn't be like if I saw it and sent it to my
23 brother-in-law or something like that.

24 MR. BLOOM: That's correct, Your Honor.

25 Through the meet and confer process or during the

1 meet and confer process I should say, we acknowledged the
2 defendants' concerns about interrogatory number 1 and we
3 substantially narrowed it.

4 All we're looking for is for them to identify
5 instances in which they caused these programs that we've
6 identified in our complaint to be published. As we
7 mentioned in our brief, we know that they -- they worked
8 with the network OEN to publish absolute proof. Those were
9 the responsive instances. And any other similar instances
10 in which they caused any programs that we've identified in
11 our complaint, that's what we want to know.

12 THE COURT: Okay.

13 Mr. Eslick, with that narrowing, is the burden
14 argument entirely gone, largely gone, not gone at all?

15 MR. ESLICK: The burden is different than the
16 interrogatory -- different than as the interrogatory is
17 worded. And there might be some incongruence in between
18 what Mr. Bloom's understanding of the narrowing is and what
19 mine is.

20 The way that we're interpreting interrogatory
21 number 1 as narrowed is if there is a statement by Mr.
22 Lindell in the allegedly defamatory broadcast, identify it.

23 And our position there is you have, the
24 plaintiffs, the allegedly defamatory broadcast. They're
25 cited numerous times in the complaint and it's just as easy

1 for plaintiffs to listen to the defamatory broadcast and
2 identify the statements. And, in fact, they already have,
3 because many of them appear in the complaint.

4 So the response, Judge, is that we appreciate the
5 narrowing and appreciate the lifting of a significant burden
6 that otherwise existed, but at this point it's just as
7 convenient for the plaintiffs to listen to the programs,
8 identify the statements that they think are defamatory, that
9 they clearly know where they were published, because they
10 would be in the allegedly defamatory programs and they know
11 when, because they've already reviewed those.

12 THE COURT: That's --

13 MR. ESLICK: That's my understanding of what
14 interrogatory number 1 is as narrowed.

15 THE COURT: You know, you've several times this
16 afternoon said you have two responses to that and I've got
17 two responses to what you just said --

18 MR. ESLICK: Okay.

19 THE COURT: -- or two questions to what you've
20 said.

21 Number one, is the standard if it's as easy for
22 the other side to get the material or is it -- is it not
23 something more like easier or substantially easier or, I
24 mean, again, you've been served with an interrogatory,
25 you've not identified a facial problem with the

1 interrogatory, you know, you're resisting answering the
2 interrogatory, as is your prerogative, but my understanding
3 is that saying it's just as easy for them to do it as for us
4 to do it will not ring the bell in terms of you not having
5 to turn it over. I have a little problem with the
6 standards.

7 MR. ESLICK: Yeah. The other piece of that,
8 Judge, is this information is already in their custody and
9 control, you know, brevity is not a future of the complaint.
10 It's 136 pages long and the exhibits are several thousand
11 more.

12 They have identified what they think the
13 defamatory statements are. And there is, if the information
14 is in their custody and control, then the interrogatory is
15 simply duplicitous. Now --

16 THE COURT: That's the second thing I wanted to
17 speak with you about.

18 Is interrogatory number 1 not asking, in effect,
19 what else is out there, not just what's in the complaint,
20 but what else did he say that defamed us?

21 MR. ESLICK: I think that was the -- I'm sorry,
22 Judge.

23 THE COURT: I'm done.

24 MR. ESLICK: Okay. I think that was the original
25 intent of interrogatory 1, but as narrowed it is about the

1 -- what they have termed the defamatory broadcast only. And
2 the defamatory broadcast, and we again go to their
3 definition, are the broadcasts where the allegedly
4 defamatory statements were made and that definition refers
5 to the complaint.

6 And so if there's a statement made in one of the
7 allegedly defamatory broadcasts identified as such because
8 it contained an allegedly defamatory statement, and that
9 definition refers to the complaint, which refers to
10 documents the plaintiff already has, then the information is
11 already in their custody and control.

12 And this relates to something, Judge, that you
13 said earlier about the last interrogatory we were talking
14 about, number 19. This information is in their custody and
15 control and it's -- it would be, again, unduly burdensome to
16 sit and listen to the numerous hours of broadcasts that
17 would be required and type out everything that Mr. Lindell
18 said.

19 MR. BLOOM: Your Honor, if I may?

20 THE COURT: Yes.

21 MR. BLOOM: I just think, we don't understand the
22 burden issue here. All we're asking for is for them to
23 identify instances in which these programs were published.
24 We're not asking them to watch the programs at all actually.

25 I gave the example or I gave the example of them

1 publishing material on OEN. What we're asking for and I
2 think what Your Honor understands we're asking for is
3 similar instances. If they -- if they published these
4 materials in Algeria, you know, that's something that we
5 want to know and that we're asking about.

6 We're not asking them to identify any specific
7 statements in the programs themselves, we're just looking
8 for instances in which they were published.

9 THE COURT: All right. Mr. Eslick, anything
10 further on this point?

11 MR. ESLICK: The only thing I'd add, Judge, is
12 then the narrowing to include only the allegedly defamatory
13 broadcasts is a bit hallow then, because we're sort of back
14 where we were in that I know that republication has been
15 taken off the table, but if I'm understanding this --

16 THE COURT: Well, I'm not sure that republication
17 has been entirely taken off the table. I think that
18 republication by people who are not -- you know, have
19 nothing to do with this case. The example me saying, here's
20 something cool and sending it to my brother-in-law, that's
21 off the table, but if Mr. Lindell or My Pillow caused this
22 to be broadcast in a market other than the one that's
23 identified in the complaint, that type of republication is
24 still in play. That's my understanding.

25 Mr. Bloom, am I right or am I wrong?

1 MR. BLOOM: You are correct, Your Honor.

2 THE COURT: So, Mr. Eslick, with that
3 understanding?

4 MR. ESLICK: In that case, Judge, I guess I would
5 ask for more clarification about the narrowing of
6 interrogatory 1 to refer only to the allegedly defamatory
7 broadcast, because if we're now talking about a publication
8 in Algeria, that's not one of the allegedly defamatory
9 broadcasts.

10 THE COURT: Well, okay. I understand your point.
11 I think there's a way of crafting it and I think I can do
12 it. Okay.

13 All right. Now have I missed anything?

14 MR. BLOOM: I don't believe so, Your Honor.

15 THE COURT: It would be hard to believe, but it's
16 been a long day.

17 Mr. Eslick?

18 MR. ESLICK: No, I don't have anything else, Your
19 Honor. Thanks for your time.

20 THE COURT: Well, hold on. We're not quite done.

21 I'm going to take a short break. I'm going to
22 create a breakout room. I'm going to huddle up with the law
23 clerk and the two externs, and I think the court reporter
24 will be glad for a break as well.

25 And so I'll be back in five minutes or so and just

1 please stand tight. And let me see if I can do this, okay.
2 This will just take a moment.

3 (Recess taken at 4:45 p.m.)

4 * * * * *

5 (4:47 p.m.)

6 **IN OPEN COURT**

7
8 THE COURT: All right. One thing that I think we
9 still need to discuss is just briefly a return to
10 defendants' request for production number 8, that's the one
11 seeking source code.

12 After reading the briefing, I was of the
13 impression that Smartmatic's position was, we do not have
14 possession, custody, or control of any of this material.

15 And I think that for the RFP as written, that is
16 true because it seeks the source code that was used in the
17 election and that is the stuff in the vault in Los Angeles.

18 However, counsel also represented that there's no
19 reason to believe that the version in the possession,
20 custody, and control of Smartmatic differs from the version
21 that's in the vault.

22 So I was not anticipating having a conversation
23 this afternoon about relevance, and burden, and security,
24 but given where we are at, I think we need to.

25 So the source code for products used in California

1 in the 2020 Election, and as I say, Mr. Eslick, I did not
2 think I needed to prepare on this so forgive me, but what is
3 the theory of relevance on that?

4 MR. ESLICK: Of the source code that Smartmatic
5 has, Your Honor?

6 THE COURT: The source code that Smartmatic has,
7 because that's the source code that I have got authority
8 over. The stuff involved in Los Angeles would be whether
9 you draw out on that subpoena motion out in L.A.

10 MR. ESLICK: So some initial thoughts on that,
11 Judge.

12 First, we don't know if the source code still
13 exists in the vault. My understanding is that Smartmatic
14 has access to that and can confirm or deny that.

15 I do know that there is limit in months after an
16 election that a governmental entity must keep records about
17 an election. So there is a possibility we may hear from
18 the, I'll call them the vault custodian, but I don't really
19 know what to call them --

20 THE COURT: I know what you mean.

21 MR. ESLICK: -- in the event that information is
22 not there.

23 Second, we do not know whether we will receive
24 objections or motion practice with respect to those
25 subpoenas.

1 So there isn't necessarily a guarantee that that
2 information will be provided to us in response to the
3 subpoenas.

4 And keep in mind, they are nonparties. So the
5 burden to them is more of a -- more of a consideration than
6 it would be as it pertains to Smartmatic.

7 And then, third, Smartmatic has claimed in the
8 complaint that statements attributed to Mr. Lindell that
9 Smartmatic's products are programmed to rig elections are
10 false and that the information in Smartmatic's machines
11 cannot be easily manipulated.

12 If there are differences between the source code
13 that Smartmatic has and source code that is in the vault
14 that change is relevant because it shows that the source
15 code can be altered. And that's one of the claims.

16 So, you know, the standard is is it relevant to a
17 claim or defense? It is for those reasons.

18 So to sum up, we may not get it from the vault
19 custodian and if we do, then we should be allowed to compare
20 what was used by L.A. County in the 2020 Election and what
21 Smartmatic has in its possession to see if the code can be
22 changed.

23 THE COURT: Ms. Ward, Mr. Eslick has some good
24 points.

25 Is this source code relevant and if it's not, why

1 is it not?

2 MS. WARD: Your Honor, first I want to clarify a
3 little bit what Smartmatic has access to and how it has
4 access to that information, because I think that's prevalent
5 to the possession point.

6 So the copy of the code that Smartmatic has access
7 to is code that is kept in a database owned and maintained
8 by Los Angeles County. Smartmatic, again, does have access
9 to it because it needs ongoing access for things like
10 maintenance and continued software development and things
11 like that, but it is not, you know, sitting within a -- you
12 know, a Smartmatic server or anything like that. This is a
13 database owned and maintained by Los Angeles County.

14 THE COURT: Okay. And so let me make sure I have
15 understood this. Because my impression when you and I
16 talked earlier was, I asked, Did Smartmatic keep any copies
17 of this? And I understood your respond in the affirmative.

18 But now you are saying no, we don't actually have
19 possession of it. If I understand what you're saying, it's
20 in the possession of Los Angeles County but it's not the
21 county that's in the vault?

22 MS. WARD: Yeah, and I very much apologize if I
23 was unclear earlier.

24 So Smartmatic has possession in the sense that it
25 could go into this database and pull that file down. That

1 is possible.

2 It is not a database that is owned by Smartmatic
3 and indeed they contract between the parties. L.A. County
4 and Smartmatic, is clear that all of those materials are
5 indeed -- you know, L.A. County maintains full intellectual
6 property rights and ownership over all of those materials.

7 And I would, again, I apologize if I misphrased
8 kind of possessive versus access, but we do have access to
9 those materials.

10 THE COURT: So to get to the bottom line, if I was
11 to enter an order on defendants' motion to compel saying,
12 Pull that thing down and turn it over, your response would
13 be, yes, we'll do that or your response would be, we're not
14 allowed to do it because we don't own it?

15 MS. WARD: So, pursuant to the contract between
16 the parties, Smartmatic is required to keep that information
17 confidential. We are not allowed to disclose it.

18 I believe there is a standard carveout for if we
19 are required to disclose information pursuant to legal
20 authority. So I think should the Court order it, it is, you
21 know, likely permissible under the contract as it's been,
22 you know, ordered by the Court, but it in general that that
23 is not something that we have the right to disclose.

24 THE COURT: Is this something that the District of
25 Minnesota can enter that order or is this an order that

1 would have to come from the Central District of California?

2 MS. WARD: Given the interests at play here, you
3 know, it's our stance that the orders would be more properly
4 -- the issue would be dealt with and the order would be
5 entered more properly in the District of California.

6 THE COURT: All right.

7 MS. WARD: But --

8 THE COURT: You do have access, you could produce
9 it in response to a court order, and you think that this
10 would be better litigated in Los Angeles than here in the
11 Twin Cities.

12 If that's all correct, then why is this source
13 code not relevant?

14 Mr. Eslick has given his reasons why it is. What
15 are your reasons why it's not?

16 MS. WARD: So, and I think this goes back more
17 generally to the exact nature of the statements made by Mr.
18 Lindell, I think at times the defendants in their briefing
19 has phrased things a little more broadly to say things like,
20 you know, Smartmatic's products in general were susceptible
21 to security issues or things like that.

22 That's not quite the statements at issue here.
23 Mr. Lindell's statements are that Smartmatic's products, the
24 software that you heard, was in fact utilized to rig or
25 steal the elections, did in fact flip votes from Trump to

1 Biden. And with those being the key statements at issue,
2 again, they need to look at the software that was actually
3 utilized.

4 THE COURT: All right.

5 Mr. Eslick, back to you for the last word.

6 MR. ESLICK: With respect to my friend on the
7 other side, I disagree that this is an issue that should be
8 litigated in California.

9 This case is here. The document request was
10 served in this litigation on the plaintiff. And under the
11 interpretation of the contract that Ms. Ward has just
12 advanced, if a court orders them to do it they can. There's
13 an exception to the contract.

14 It doesn't say a California court has to do it, it
15 just says a judicial authority. And I don't have a page for
16 you, I imagine Ms. Ward might.

17 THE COURT: That's okay.

18 MR. ESLICK: And so this Court as a judicial
19 authority can order that, which would trigger the
20 requirement that the plaintiffs produce it.

21 It's unclear to me how it's necessary for a judge
22 in California to order Smartmatic to do anything because
23 there's no litigation there.

24 The case is here. This Court has jurisdiction to
25 issue orders governing the discovery process. And it seems

1 to me that if that order issues, Smartmatic has the
2 capability to do that without running afoul of the contract.

3 THE COURT: All right.

4 MS. WARD: Your Honor, may I make one brief point?

5 THE COURT: Briefly, yes.

6 MS. WARD: Yeah, so one just very quick point.

7 So we've been talking in our discussion here in
8 the briefing about production. I just want to make the
9 point that to the extent that the Court is inclined to agree
10 that these materials are discoverable, that inspection and
11 not wholesale production is the appropriate mechanism to do
12 so, given the significant security concerns and the highly
13 confidentiality nature of this material.

14 And I think that's something the parties could
15 potentially work out a protocol for inspection if the Court
16 is so inclined, but I just want to make that point clear.

17 THE COURT: All right. Point taken.

18 All right, everyone. I will take that under
19 advisement, but Ms. Ward, just FYI, on the ultimate issue, I
20 don't know, but I agree with Mr. Eslick, the case is here,
21 it's in Minnesota.

22 There is no litigation with Mr. Lindell and
23 Smartmatic and My Pillow in Los Angeles. And I don't know
24 what procedural vehicle you would use to get it before a
25 judge out there or why that judge would not say, why am I

1 hearing this, send it back to Minnesota.

2 So I will make a decision but I agree with Mr.
3 Eslick, it is my decision to make and not the decision of a
4 judge in California.

5 All right. Is there anything else about anything
6 else before we wrap up?

7 Mr. Eslick, let's start with you.

8 MR. ESLICK: No, Your Honor.

9 THE COURT: Mr. Bloom?

10 MR. BLOOM: No, Your Honor.

11 THE COURT: Ms. Ward?

12 MS. WARD: No, Your Honor. Thank you.

13 THE COURT: All right.

14 Thank you all for hanging in here through a long
15 hearing.

16 Have a good evening. Court is adjourned.

17 And I will see law clerk and externs in just a
18 moment. I'll send a zoom invitation. Thank you.

19 MR. MANSKE: Thank you, Your Honor.

20 MR. BLOOM: Thank you, Your Honor.

21 MR. ESLICK: Thank you.

22 **(Court adjourned at 4:58 p.m.)**

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REPORTER'S CERTIFICATE

I certify the foregoing pages of typewritten material constitute a full, true and correct transcript of my original stenograph notes, as they purport to contain, of the proceedings reported by me at the time and place hereinbefore mentioned.

/s/Lynne M. Krenz

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